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NO_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

James M. Cox Jr. Petitioner

vs.

United States - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED

Can the United States condemn farm and pasture lands under the authority of the Weeks Act, 16 U.S.C. §§ 516 et. seq. and the South Carolina enabling statute, S.C. Code ann § 3-1-410 based on options from disinherited life tenants with no estate in possession where such acquisitions required consent from owners in fee? Where the Congress specifically made no provision for in rem condemnation proceedings under the Weeks Act, could trust estate lands be condemned denying remaindermen in whom the fee would vest January 21, 1988 due process of law and depriving them of their real property and their fifth amendment rights. In this case, can the Court ignore the Supreme Court decision in Nichols v. Eaton sec. 91 U.S. 719, 23 L ed. 254 and also deny remaindermen the protection afforded by S.C. Statutes 27-5-40 and 27-5-50? Can life tenants be allowed to destroy contingent remainders in direct violation of testator's will thus profiting under the will they destroy? Would not relief under Fed. R. Civ. P. 60(b)4 to correct for a void judgment be proper?

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No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM 1993

James M. Cox Jr., et al. - Petitioner

vs.

United States of America - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, James M. Cox Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fourth Circuit failing to recognize that condemnation proceedings under authority of the Weeks Act were not conducted according to law and are therefore void ab initio having deprived the pro se plaintiff his 5th amendment rights to property. The Congress had denied the Weeks Act eminent domain power.

OPINIONS BELOW

The published opinion of the Court of Appeals No. 77-1678 decided November 17, 1978. The published opinion of the Court of Appeals No. 86-3636L and No. 86-3537 decided May 6, 1987.

Jurisdiction

The Court of Appeals' opinion in this matter was decided May 6, 1987. The Court of Appeals denial of plaintiff's petition for rehearing was filed November 23, 1993. This Court's jurisdiction is invoked under Fed.R.Civ.P. 60(b). Pro se plaintiff J.M. Cox Jr. was not res judicata to Fourth Circuit ruling of May 6, 1987.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amendment V to the United States Constitution Rule 2 of the Federal rules of civil procedure. South Carolina Statute 27-5-40 and 27-5-50.

STATEMENT OF THE CASE

The United States District Court, District of South Carolina, Greenwood Division had jurisdiction pursuant to Fed.R.Civ.P. 60(b).

THE ISSUE BEFORE THE COURT IS A CONSTITUTIONAL ISSUE.

W.K. Bradley owned 3,200 acres near McCormick, South Carolina. He died in 1881, leaving a will which created a series of life estates incorporating by reference the Rule Against Perpetuities. Under the Bradley will, contingent remainders did not vest until January, 1988, and any beneficiary attempting to defeat the provisions of the will was automatically disinherited.

Although it had no such authority under the Weeks Act, in the 1930's, the Forest Service attempted to acquire the land by condemnation utilizing purely perfunctory guardians ad litem to represent minor and unknown heirs. In an attempt to defeat the series of life estates and contingent remainders created by the Bradley will, the Petitioner's mother and the other adult life tenant optioners of the Bradley Trust Estate signed options to the Forest Service thereby automatically disinherited themselves under the Bradley will. As of the moment the above life tenant contingent remainder optioners were disinherited, the petitioner then became a life tenant and contingent remainderderman [contingent upon his survival until

January, 1988]. Under the terms of the Bradley will, these interests could not merge.

In 1973, certain Bradley heirs filed suit against the Forest Service [Klugh v. U.S.]. Petitioner's petition to intervene in that case was denied. Subsequently, within the statutory period after the vesting of his contingent remainder interest in January, 1988, Petitioner filed this action pro se seeking to set aside the Forest Service condemnation as void ab initio.

In 1980 the pro se plaintiff realized he might be bound by a ruling or order that was not proper. In order to protect his interest, the plaintiff had a proper motion to intervene submitted to the district court requesting the right to intervene. The district court denied the plaintiff the right to intervene. The pro se plaintiff having been denied the right to intervene, was denied the right to make a request for review or to appeal the Klugh judgment.

The plaintiff is not res judicata to the Klugh judgment and has the legal right to address and challenge every part of the Klugh judgment.

Having been denied the right to intervene, the only

recourse for the pro se plaintiff was to file a complaint of original jurisdiction. The complaint of the pro se plaintiff is an original action or summons no part barred by any previous action. This action is a case of original jurisdiction to take cognizance of a cause at its inception, to be tried and judgment passed based on the law and facts (distinguished from appellate jurisdiction).

The district court denied the pro se plaintiff a trial before the Court. The district court, on the basis of issues conclusively presumed against the plaintiff involving res judicata and limitations, dismissed the claim of the plaintiff unlawfully depriving the plaintiff of his real property. The district court totally denied the pro se plaintiff due process of law to state in open court the statutory law, the case law, and the true facts that would show the issues conclusively presumed against the plaintiff were in error. The above unlawful action by the Court effectively nullified plaintiff's Fifth Amendment rights under the Constitution. The pro se plaintiff was deprived of his real property without just compensation.

The attempted condemnations conducted under the

Weeks Act resulted in judgments that were void ab initio. The Weeks Act, as has been shown in motions and answers that are already before the Court, was without statutory authority to take, to divest the lands out of all parties. The congress had denied the Weeks Act eminent domain power. The Weeks Act provided only for peaceful acquisition. It took an option from an "owner in fee" to activate a Weeks Act acquisition. The options the Forest Service solicited and accepted were from the adult life tenants of the Bradley Trust Estate who never had any land in possession and who never owned any land. The Attorney General, The Secretary of Agriculture and the Forest Service were knowledgeable from the abstract records that the options were from the adult life tenants who never owned any land and had no land in possession, and are estopped. The abstract lawyer advised "these people cannot pass title."

The Attorney General, the Secretary of Agriculture and the Forest Service presented these options to the condemnation court as options from owners in fee perpetrating fraud on the condemnation court resulting in the judgments being void ab initio. The condemnation judgments were void for a number of other reasons that

are addressed in motions and answers that are already before the Court. A void condemnation judgment passes or conveys no property right or title. A void condemnation judgment never achieves legitimacy, and may be attacked at any time.

> **VOID JUDGMENT**--One which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Reynolds v. Volunteer State Life Ins. Co., Tex. Civ. App., 80 S.W. 2d 1087, 1092.
>
> **VOID JUDGMENT**--One which, from its inception is and forever continues to be absolutely null, without legal efficacy, ineffectual to bind parties or support a right, of no legal force and effect whatever, and incapable of confirmation, ratification, or enforcement in any manner or to any degree. Ex parte Myers, 121 Neb. 56, 236 N.W. 143, 144.

In the cases cited infra, the United States is a defendant; the same as the United States is a defendant in the instant void judgments that are before this court.

A void act or judgement may be attacked in any

judicial tribunal, in any other cause, at any time the question arises. National Silver Company v. United States, 333 F.Supp. 551, 554 (Cust.Ct.1971), and cases cited therein.

The pro se plaintiff brings to the attention of the court that he has a right to attack the instant void judgments in any tribunal, in any other cause, at any time the question arises as the void judgments conveyed no right, title, interest, or equity or claim of any description to the defendant, United States. The void condemnation judgments gave the Forest Service no claim or right to move on to the Bradley Trust Estate lands, and any presence of the Forest Service on the Bradley Trust Estate lands would be by trespass and strong hand as a disseisor, a usurper. By definition, the words "strong hand" would imply a degree of "criminal" force.

> The statutes relating to forcible entries use the words "with strong hand" as describing that degree of force which makes an entry or detainer of lands "criminal."

For the Forest Service to have maintained this criminal presence on the lands of the Bradley Trust

Estate would give the United States no claim as under South Carolina law, estates in remainder cannot be adversely possessed.

In addition to the above, any activity the Forest Service was pursuing, whether it be operating as a National Forest or whatever, would not overcome the fact of the condemnation judgments being void at inception, and forever continues to be absolutely null and would give no claim of any description to the United States.

The Fourth Circuit in opinion of November 10, 1993 attempts to bring this action under 2409a(g). The true facts before the Courts show any presence of the Forest Service on the lands of the Bradley Trust Estate is by trespass and stronghand. Estates in remainder cannot be adversely possessed. The Fourth Circuit Court of Appeals on page 4 of the order of May 6, 1987, states as follows:

> We held that under the terms of the will, title would irrevocably vest twenty-one years (possibly twenty-one years and nine months) after the death of the survivor of the testator's children and grandchildren living on the date of Bradley's death. Since the last survivor died January 21, 1967, we concluded that the fee would not have irrevocably

vested until January 21, 1988, and possibly as much as nine months later.

Under South Carolina statutes relating to trust estates, estates in remainder cannot be adversely possessed. The United States gained no claim by maintaining the criminal presence on the lands of the Bradley Trust Estate. There could be no application of 2409a(g). The United States has never had a claim to the lands of the Bradley Trust Estate.

The Forest Service knew from the abstract records that the options solicited and accepted by the Forest Service were from life tenant optioners who never owned any land and had no land in possession. The Forest Service would be estopped. The Forest Service knew of the South Carolina statutes and case law that give contingent remaindermen total protection from such unlawful options and any destructive act by life tenants. **Statute 27-5-40 Feoffment with livery of seizin** shall not defeat remainder. No estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seizin.

§ 27-5-50. Warranties by life tenants and certain others shall be void.

All warranties which shall be made by any tenant for life of any lands, tenements or hereditaments descending or coming to any person in reversion or remainder shall be void and of no effect.
All collateral warranties which shall be made of any lands, tenements or hereditaments by any ancestor who has no estate of inheritance in possession in them shall be void against his heir. Under this section [Code 1962 § 57-4] a life tenant cannot destroy contingent remainders, and there is no peril of destruction that requires a trustee to protect same. Spann v. Carson, 123 SC 371, 116 SE 427 (1923).

The Forest Service was on notice of the total protection afforded contingent remaindermen from any destructive act by life tenants. The Forest Service is estopped.

THE LANDS OF THE BRADLEY TRUST ESTATE COULD NOT BE ALIENATED.

The lands of the Bradley Trust Estate could not be alienated as per the W.K. Bradley will and the 1910 court interpretation.

Under the legal interpretation of the will, the

land could not be alienated for a period of lives in being and twenty-one years. The testator stated the land was not to be disposed of in any way for the debts of anyone or all the family. Under the in terrorem provisions of the will, anyone attempting to dispose of the land would be automatically and spontaneously disinherited by the order of the will. The W.K. Bradley will was in compliance with the requirements of South Carolina law to effect a disinheritance. On August 20, 1935 when adult life tenant contingent remaindermen with no estate in possession gave the unlawful options on the lands of the Bradley Trust Estate in violation of the order of the will and triggered the in terrorem provision of the will, these unlawful adult life tenant optioners with no estate in possession were spontaneously and automatically disinherited by the order of the will and had forfeited all rights they had as heirs under the W.K. Bradley will and to the lands of the Bradley Trust Estate.

The moment the unlawful adult life tenant optioners of the Bradley Trust Estate were disinherited by the in terrorem provisions of the will by the order of the will, there arose a new set of successive ongoing replacement

life tenant contingent remaindermen.

THE FOLLOWING STATEMENT IS FROM PAGE 5 OF THE FOURTH CIRCUIT'S ORDER OF MAY 6, 1987.

> On cross motions for summary judgment as to liability, the district court ruled that the plaintiffs who were adults at the time of the condemnation proceedings and had consented to the condemnations, could not recover notwithstanding their contention that they were foreclosed from giving valid consent to the condemnation by the Bradley will because the will prohibited transfer of the properties. The district court therefore gave judgment for the United States as to them.

The district court should have recognized that the adult plaintiffs had been disinherited as of August 20, 1935, but "The district court gave judgment for the United States as to them." This judgment gave or conveyed no claim, right, title, equity, or interest of any description to the United States.

The United States having received no claim of any description from the judgment against the disinherited life tenant optioners, there would be no disputed title to litigate. The United States has never been a joint

tenant or co-tenant with any heir under the will of W.K. Bradley. There would be no claim the United States could use to force this action under the Quiet Title Act. There would be no running of limitations against the minor heirs or any party referenced to in the unlawful remand order.

It is also brought to the attention of the court that the Attorney General, the Secretary of Agriculture and the Forest Service were knowledgeable that the life tenant optioners who were disinherited August 20, 1935 having forfeited their rights under the Bradley will and to the lands of the Bradley Trust Estate, there was no party before the Court who could act in the legal capacity of party plaintiff in the 1936-1939 void condemnation proceedings. The above listed government agencies would be estopped. The above attempted condemnation proceedings under the Weeks Act should have been dismissed by the court as there was no party plaintiff who could legally stand before the condemnation court. The 1936-1939 condemnation judgments were void ab initio.

It has been brought to the attention of the court by motions and answers that these disinherited adult

life tenant optioners could not be party to or play any legal part in the following void condemnation proceedings:

VOID CONDEMNATION ACTION NO. L2592 - 17 MONTHS AFTER THE ADULT LIFE TENANT OPTIONERS HAD BEEN DISINHERITED AND, VOID CONDEMNATION ACTION NO. 29 - SOME THREE AND ONE HALF YEARS AFTER THE ADULT LIFE TENANT OPTIONERS HAD BEEN DISINHERITED.

The Court on page 11 of the Order of May 6, 1987 states as follows:

> The QTA, by § 2409a(f), provides:
>
> Any civil action shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

The following is from page 4 of the Court's order of May 6, 1987.

> Under the terms of the will, title would irrevocably vest twenty-one years (possibly twenty-one years and nine months) after the death of the survivor of the testator's children and granchildren living on

the date of Bradley's death. Since the last survivor died January 21, 1967, we concluded that the fee would not have irrevocably vested until January 21, 1988, and possibly as much as nine months later.

The Fourth Circuit recognized that the fee would not vest until January 21, 1988 and that South Carolina statutes that relate to trust estates, would prevail. Estates in remainder could not be adversely possessed before this date.

The following case laws upheld and affirmed by the Fourth Circuit, hold that the statute of limitations as referenced in 2409a(f) would not accrue or commence to run against the contingent remaindermen until vesting of remainder.

> Since the remaindermen in the case at bar had no interest in the subject property such as to entitle them to maintain an action with respect to it, the statute of limitations does not commence to run against them until the vesting of remainder.
> In other words, the stature of limitations does not begin to run against the remaindermen until the termination of the life estate. Rollins v. May,

473 F. Supp. 358 (D.S.C. 1978), aff'd 603 F. 2d 487 (4th Cir. 1979); Pineland Club v. Sanders, supra; Stamper v. Avant, 333 S.C. 359, 104 S.E. 2d 565 (1958); Crotwell v. Whitney, 229 S.C. 213, 92 S.E. 2d 473 (1956); Bolt v. Sullivan, 173 S.C. 24, 174 S.E.

As in Rollins v. May, the remaindermen had no interest in the subject property to maintain an action to evict the Forest Service, a disseisor, from the Bradley Trust Estate lands prior to January 21, 1988.

The magistrate judge on the basis of issues conclusively presumed against the pro se plaintiff, dismissed plaintiff's claim, unlawfully depriving the plaintiff of his real property without due process of law.

The magistrate judge rules that the pro se plaintiff is res judicata to the Klugh case as the plaintiff's mother was party to the Klugh case. The Fourth Circuit states on page 14 of the Order of May 6, 1987 as follows:

> Under certain circumstances it is true that a non party to the action may be bound by the judgment under res judicata if one of the parties to the action is so closely alligned with the interest of the non party as to be his Virtual Representative.

The plaintiff was not in any binding privity with his mother or any party to the Klugh proceeding or the condemnation proceedings. The plaintiff receives his per stirpes rights under the will of W.K. Bradley directly from the will and not from any other decedent or any other party. (Heady v. Crouse).

The following case law is presented to show that J.M. Cox Jr. was not in any binding privity with his mother Carolyn B. Cox, and was not bound in any judgment rendered against Carolyn B. Cox.

> Privity exists between a decedent and his heir, next of kin, devisee, or legatee and a judgement for or against decedent prior to his death will conclude such persons as to all matters in issue in the case and determined by the judgement but not as to other matters. THE RULE DOES NOT APPLY TO A PERSON WHO ALTHOUGH RELATED TO DECEDENT FOR OR AGAINST WHOM THE JUDGEMENT WAS RENDERED DOES NOT ACQUIRE HIS RIGHT OR TITLE FROM THAT DECEDENT, BUT RATHER UNDER THE WILL OF ANOTHER DECEDENT. (Heady v. Crouse 100 S.W. 1052. 203 Mo. 100, 120 AMS.R. 643.

The pro se plaintiff acquired no right or title from his mother, Carolyn B. Cox but received his

per stirpes rights to the lands of the Bradley Trust directly from the will of W.K. Bradley.

The pro se plaintiff takes total exception to the following statement from Report of Magistrate as it would have no application to the plaintiff.

> The defendants contend that res judicata is applicable to this case, as all issues concerning the condemnation should have been addressed in Klugh. In Klugh, the plaintiff's mother, a party to that action, was given the opportunity to amend her complaint pursuant to the Quiet Title Act. In an order dated February 25, 1988, in compliance with the Fourth Circuit decision, the court granted the plaintiff's mother the right to reopen the case within sixty days. The plaintiffs did not move to reopen, nor did they appeal either the District Court or the Court of Appeals decision.

The pro se plaintiff not being in any binding privity with his mother, Carolyn B. Cox, was not bound by any action his mother took or failed to take.

As stated and substantiated supra, the plaintiff is not res judicata to the Klugh judgment and as stated and

substantiated by case law Heady v. Crouse supra, the plaintiff was not in any binding privity with his mothe and was not bound in or by any judgment rendered agains Carolyn B. Cox. As stated supra, the plaintiff receive or acquired no right or title to the lands of the Bradl Trust Estate from his mother but received his per stirp rights to the land of the Bradley Trust Estate directly from the will of W.K. Bradley.

The pro se plaintiff brings before this Court that the adult life tenants who optioned the lands of the Bradley Trust Estate and were disinherited as of August 20, 1935 and had forfeited all rights to the lands of the Bradley Trust Estate, could not be a legal party plaintiff in the condemnation proceedings or the Klugh proceedings. In addition, the contingent remaindermen such as minors or those acting as party plaintiff to these proceedings, had no interest in the subject property to entitle them to maintain an action with respect to it (See case laws Rollins v. May and Pineland Club v. Sanders, supra; upheld and affirmed by the Fourth Circuit). There were no proper party plaintiffs who could legally stand before the Court in the condemnation or Klugh proceedings. These actions should

have been dismissed. The judgments rendered would be void.

THE SUPREME COURT RULING IN THE LANDMARK CASE NICHOLS V. EATON SHOULD END THIS LITIGATION.

The legal issues before the Court in this litigation have already been decided by the Supreme Court of the United States in the "landmark" case Nichols v. Eaton, Supreme Court of the United States, 1875 § 91 U.S. 716, 23 L. Ed. 254. A Supreme Court ruling takes precedence and would rule in this case. In Nichols v. Eaton:

> "This distinction is well founded in the sound and unanswerable reason, that the creditor is neither defrauded nor injured by the application of the law in this case, as he knows, where he parts with the consideration of his debt, that the property so exempt can never be made liable to its payment. Nothing is withdrawn from this liability which was ever subject to it....
>
> In this country all wills or other instruments creating such trust estates are recorded in public offices where they may be inspected by anyone, and the law in such cases imputes notice to all persons concerned of all the facts which they might know by the inspection."

The legal issues in the instant litigation are the same as the issues that were addressed in Nichols v. Eaton. The position of the Forest Service in this litigation is the same as the position of the creditor in Nichols v. Eaton. The Forest Service is neither defrauded nor injured by the application of the law to the case. The Forest Service had the full knowledge when the Forest Service parted with the consideration or void condemnation proceeds to the disinherited life tenants with no estate in possession for the Bradley Trust Estate lands, that the property so exempt could never be liable for the consideration. The W.K. Bradley will that created the Bradley Trust Estate was properly admitted to probate and was available with other court records where they could be inspected by anyone, and the law in such cases imputes notice to all persons concerned of the facts that they might know by the inspection. In addition to the above, the Forest Service abstract records contained a copy of the W.K. Bradley will and the 1910 court interpretation. The Forest Service, in soliciting and accepting options from life tenant optioners with no estate in possession, became "res judicata to all the infirmities of the life tenant optioners."

The above Supreme Court ruling in Nichols v. Eaton would obviate and finalize any further litigation in this case.

The disinherited adult life tenant optioners could not act as virtual representatives for the minors in the 1936-1939 condemnation proceedings. The following statement is from page 17 of the Fourth Circuit Order of May 6, 1987:

> (T)he condemnation court was on notice that the adult heirs would be acting in the capacity as virtual representatives for these remaindermen [and] there was no divergent interest between these two classes which would have made this representation invalid. As a consequence, we think that under the doctrine of virtual representation, the known minor or incompetent heirs who were represented by guardians ad litem were bound by the condemnation judgments and they have no right to recover in this lawsuit.

REMAINDERMEN ARE NOT BOUND BY THE ABOVE FALSE STATEMENT AND HAVE THE FULL RIGHT TO RECOVER IN THIS LAWSUIT.

The above disinherited adult heirs had forfeited all rights they had as heirs under the Bradley will and

to the lands of the Bradley Trust Estate. These disinherited adult heirs having no further rights under the Bradley will after August 20, 1935 could in no way act in the capacity of virtual representatives for the minor per stirpes contingent remaindermen in the void condemnations conducted during the "1936-1939" period.

The district judge, as held in the 2nd paragraph of page 17 of the Fourth Circuit's Order of May 6, 1987 states that the minor heirs or incompetents who were represented by guardian ad litem in the condemnation proceedings, were entitled to recover because the guardians made only a perfunctory appearance in the condemnation proceedings in which they submitted the interest of their clients to the Court and thus failed to protect their client's interest.

It has been shown and substantiated supra that the adult disinherited life tenant heirs (See page 17 of the Order of May 6, 1987), could not act as virtual representatives for the minors and that the perfunctary appearance of the guardian ad litem failed to protect the minor's interest. The minors are not bound by the void condemnation judgments and have a right to recover in this lawsuit.

The Forest Service knew that every minor was a per stirpes contingent remainderman holding their per stirpes rights to the Bradley Trust Estate totally independent of each other and any other remainderman. There could be no application of the doctrine of virtual representation. No one could speak for these minor remaindermen or act as virtual representative to force these minor contingent remaindermen to dispose of their contingent remainder in direct violation of the W.K. Bradley will and in violation of case law Lemon v. Wilson stated infra. At the time of the condemnation proceedings, every heir under the Bradley will was a contingent remainderman.

> Even with consent, no adult or properly represented minor, incompetent, unknown heir, or unborn heir, could through legal proceedings, transfer any contingent remainder which they possessed, since under certain circumstances, such contingent remainder interest may not be devised, transmitted, or assigned. Lemon v. Wilson 204 S.C. 50, 28 S.E. 2d 792, 804 (1944).

CONCLUSION: The pro se plaintiff brings before the Supreme Court that every issue raised by the Courts, by defendants counsel, by the Fourth Circuit's order of

May 6, 1987, by the Fourth Circuit's opinion of November 10, 1993 as refers to 2409a(g), res judicata and limitations are issued conclusively presumed against the pro se plaintiff. The pro se plaintiff begged throughout these proceedings that he not be denied due process of law and for the right to face defendants counsel in adversary proceedings as to every issue conclusively presumed against him. The issues raised in plaintiff's complaint were never addressed. As stated supra, the 1936-1939 condemnations were void ab initio. As shown on pages 8 and 9 of this answer, the Forest Service gained no claim of any description by maintaining the unlawful presence on the Bradley lands as estates in remainder cannot be adversely possessed. The United States, having no claim of any description to the Bradley lands, there is no disputed title to litigate. There is no application of 2409a, the Quiet Title Act. There is no unlawful running of limitations as per the order of May 6, 1987 that apply to the contingent remaindermen (see case law Rollins v. May on page 16 of this answer). The remand order of May 6, 1987 is totally in error. The Courts, depriving the plaintiff due process of law as to every issue conclusively

presumed against him, are able to trash and nullify the Fifth Amendment to the Constitution.

It has been shown on pages 10, 11 and 12 of this answer that the adult life tenant optioners of the Bradley land had been disinherited as of August 20, 1935. These disinherited adult life tenant optioners could not be a legal party plaintiff in the three 1936-1939 void condemnation proceedings or in the later Klugh proceedings. There being no legal party plaintiff who could stand before the Court in these proceedings, any judgments rendered would be totally void.

> Under constitutional provision guaranteeing right to obtain justice, the "justice" to be administered by courts is not an abstract justice as conceived of by the judge but justice according to law or, as it is phrased in the constitution, "comforably to the laws". State ex rel. Department of Agriculture v. McCarthy, 238 Wis. 258, 299 N.W. 50, 64.

Since ethics is the corner stone of the office of Attorney General of the United States, the error and unlawful action of the office of Attorney General that resulted in the remaindermen being unlawfully deprived of their real property by the Attorney General bringing,

instructing and sanctioning of the unlawful and void 1936-1939 condemnation judgments which were dependent upon void and worthless options from disinherited life tenants, is brought before the Attorney General that this error be addressed and corrected.

The pro se plaintiff has been totally denied due process of law throughout the entire proceedings. Every issue raised by defendants, defendants counsel or the Court were issues conclusively presumed against the pro se plaintiff. The plaintiff has been deprived of his real property unlawfully. The plaintiff has been denied due process of law to show the issues conclusively presumed against him are totally in error. The plaintiff has been totally denied the protection afforded by the Fifth amendment that relates equally as to life, liberty and "property". The efforts of the District Court and the Fourth Circuit have been to achieve by res judicata what could not have been achieved if the pro se plaintiff had been accorded due process of law. The efforts of the Court to suppress due process was to prevent the true facts, the statutory law and the case law that relate to this case from being presented in open court and to forever foreclose by res judicata that

the true facts, statutory law and case law would ever be raised or addressed. The courts, by denying the pro se plaintiff due process of law as to issues conclusively presumed against him, and unlawfully depriving him of his real property, would be setting a precedent where a citizen could be denied due process of law as to issues conclusively presumed against him and deprive him of his life. The courts, by effectively nullifying the Fifth amendment, the issues that relate to this case have not been accorded a fair and just trial.

This case is exactly where it was 21 years ago.

THE ACTION OF THE GUARDIAN WAS LESS THEN PERFUNCTORY

The guardian ad litem in neither condemnation proceeding took any action or attempted to protect or raise the rights of or address the issue of the minor per stirpes contingent remaindermen.

> "Where the rights of remaindermen were not raised in these proceedings, this cannot be conclusive to the rights of remaindermen." Lane v. Taylor 152 S.W. 2d 271, 287, Ky. 116.

THE 1936-1939 CONDEMNATION JUDGMENTS WERE VOID AB INITIO

The fact of the case and the applicable South Carolina statutes and case law confirm the following

facts that the condemnation proceedings:

1, Never had jurisdiction of the parties (not the first owner in fee). 2. Never had jurisdiction of the subject matter (not the first acre of land). 3. Never had statutory authority under the Weeks Act to conduct an "in rem" condemnation proceeding "to take". The condemnations were conducted with a total want and denial of due process of law.

> In Marquette Corp. v. Priester, 234 F Supp. 799, 802 (D.S.C. 1964). Quoting Austin v. Smith, 312 F 2d 337, 343 (D.C.Cir. 1962). "A judgment is void if the Court that rendered it lacked jurisdiction of the subject matter, or of the Parties, or acted in a manner inconsistent with due process."

The District court has jurisdiction to vacate and set aside judgments in condemnation proceedings on showing of such equitable consideration as to judtify such relief, notwithstanding expiration of term at which judgment was entered. United States v Jordan, 186, F 2d 803, 805-806, aff'd per curiam 72 S. Ct. 305, 342 U.S. 911, 96 L. Ed. 682 (1951).

The above case law which has been affirmed "per curium" by the United States Supreme Court would grant relief from the void condemnation judgments that are before this court. 3-5-94 of J.D. Dale Jr., pres de

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3536(L)

Margaret Klugh; Katherine Klugh Maultsby; Mary Klugh Garner; John Bradley Klugh; William W. Bradley, III; Frederick H. Bradley; Patrick H. Bradley; Edna Bradley Troxell; Hugh W. Bradley; Mabel Bradley Payne; Mary Bradley Pressly; Thomas R. Bradley; William T. Bradley; Margaret Bradley Poole; David W. Bradley; John T. Bradley, Jr.; Frances K. Bradley; Mark E. Bradley, Jr.; Elizabeth Bradley McGarity; Robert F. Bradley, III; Thomas J. Bradley; Frances Wright Bradley, III; William R. Bradley, II; Rufus A. Johnson, III; Mary Bradley Brown; Margaret Bradley Shuford; Arthur L. Bradley; James B. Bradley; Curtis L. Bradley; David J. Wardlaw; Martha Wardlaw Buie; Foster Bradley Wardlaw, Jr.; Ivey Jean Wardlaw Pressly; Robert S. Wardlaw; William W. Wardlaw; Mildred E. Wardlaw; John U. Wardlaw; Mary Wardlaw Deason; Annie Wardlaw Wright; Frances M. Wardlaw; John K. Bradley; Mary Bradley Miller, Martha Bradley Moody; Frances Trenholm Bradley; Jane H. Bradley; Martha B. Mayo; Robert F. Bradley, Jr.; Eustace U. Bradley; Mary Bradley Cox and Frances Thompson Sheppard,

Appellants,

versus

United States of America; Certain Lands Located in Abbeville, Greenwood and McCormick Counties, South Carolina, Being a Portion of the Estate of W. K. Bradley, Deceased and the United States Department of Agriculture,

Appellees.

APPENDIX A

No. 86-3537

Margaret Klugh, Katherine Klugh Maultsby; Mary Klugh Garner; John Bradley Klugh; William W. Bradley, III; Frederick H. Bradley; Patrick H. Bradley; Edna Bradley Troxell; Hugh W. Bradley; Mabel Bradley Payne; Mary Bradley Pressly; Thomas R. Bradley; William T. Bradley; Margaret Bradley Poole; David W. Bradley; John T. Bradley, Jr.; Frances K. Bradley; Mark E. Bradley, Jr.; Elizabeth Bradley McGarity; Robert F. Bradley, III; Thomas J. Bradley; Frances Wright Bradley, III; William R. Bradley, II; Rufus A. Johnson, III; Mary Bradley Brown; Margaret Bradley Shuford; Arthur L. Bradley; James B. Bradley; Curtis L. Bradley; David J. Wardlaw; Martha Wardlaw Buie; Foster Bradley Wardlaw, Jr.; Ivey Jean Wardlaw Pressly; Rosert S. Wardlaw; William W. Wardlaw; Mildred E. Wardlaw; John U. Wardlaw; Mary Wardlaw Deason; Annie Wardlaw Wright; Frances M Wardlaw; John K. Bradley; Mary Bradley Miller; Martha Bradley Moody; Frances Trenholm Bradley; Jane H. Bradley; Martha B. Mayo; Robert F. Bradley, Jr.; Eustace U. Bradley; Mary Bradley Cox and Frances Thompson Sheppard,

Appellees,

versus

United States of America; Certain Lands Located in Abbeville, Greenwood and McCormick Counties, South Carolina, Being a Portion of the Estate of W. K. Bradley, Deceased and the United States Department of Agriculture,

Appellants.

Appeals from the United States District Court for the District of South Carolina, at Greenwood. Soloman Blatt, Jr., Chief District Judge. (CA 73-95)

Argued: December 10, 1986 Decided: May 6, 1987

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Frank H. Clabaugh (Dowling, Sanders, Dukes & Svalina, P.A.; Joseph O. Rogers; Thomas E. Shealy; Rogers & Riggs, P.A. on brief) for appellants; J. Carol Williams, Department of Justice, Land and Natural Resources Division (F. Henry Habicht, II, Assistant Attorney General; Vinton Devane Lide, United States Attorney; J. D. McCoy, III, Assistant United States Attorney; Sylvia Sepulveda-Hambor; Dirk D. Snel on brief) for appellees.

WINTER, Chief Judge:

In a previous appeal, we construed the will of W. K. Bradley of South Carolina who died in December 30, 1881 to determine the persons in whom the fee of his real property would ultimately vest. Klugh v. United States, 588 F.2d 45 (4 Cir. 1978). We considered the question because certain of Bradley's lineal descendants were claiming that their property interests in land previously owned by him were not validly acquired by the United States in several condemnation proceedings undertaken in 1936-39 pursuant to the Weeks Act, 16 U.S.C. §§ 16 et seq. We held that under the terms of the will, title would irrevocably vest twenty-one years (possibly twenty-one years and nine months) after the death of the survivor of the testator's children and grandchildren living on the date of Bradley's death. Since the last survivor died January 21, 1967, we concluded that the fee would not have irrevocably vested until January 21, 1988, and possibly as much as nine months later. In the course of making this ruling, we noted an ambiguity as to the jurisdictional base on which the suit proceeded. We therefore directed the district court to require plaintiffs to amend their complaint to allege why the district court had

jurisdiction of the case. Id. at 52, n.4.

With the interests of the testator's lineal descendants so defined, the district court on remand undertook to adjudicate the rights of the parties. The plaintiffs sought return of title of the various properties and an accounting for their interim use. They alleged that they proceeded under F. R. Civ. P. 60(b) to reopen the judgments in the earlier condemnation cases on the grounds that the judgments were void, or, alternatively, that they should be set aside for good cause. On cross motions for summary judgment as to liability, the district court ruled that the plaintiffs who were adults at the time of the condemnation proceedings and had consented to the condemnations could not recover notwithstanding their contention that they were foreclosed from giving valid consent to the condemnation by the Bradley will because the will prohibited transfer of the properties. The district court therefore gave judgment for the United States as to them. But the district court gave summary judgment as to liability against the United States by setting aside the condemnation judgments in favor of (a) heirs who were unknown at the time of and who were not represented in the condemnation cases, (b) heirs who were unborn at

the time of the condemnation cases, and (c) known minor and incompetent heirs at the time of the condemnation proceedings who were represented by a guardian ad litem because the guardian failed adequately to perform his duty. Klugh v. United States, 620 F. Supp. 892 (D. S.C. 1985). The district court certified an interlocutory appeal, and the non-prevailing plaintiffs and the United States both appealed. We allowed the appeal. We affirm to the extent that the district court ruled the United States was not liable to consenting adult condemnees, and we vacate the remainder of the judgment and remand for further proceedings.

I.

The facts were stated extensively in our prior opinion, and we will not repeat them. Where necessary, we will refer to them and state additional facts in the text which follows:

II.

Even without consideration of the jurisdictional base on which the suit was brought, we agree with the district court that plaintiffs who were adults and who consented to the condemnations may not maintain suit on

the ground that under the Bradley will they were prohibited from giving valid consent to convey their property. Under principles of estoppel, we hold that they are foreclosed from making this argument.[1] In their appeal (No. 86-3536), we affirm.

III.

As we stated, in the previous appeal we required plaintiffs to allege the basis on which the jurisdiction of the district court was invoked. Plaintiffs, consistent with their claim that they were entitled to at least a partial return of the property, alleged that they were proceeding under F. R. Civ. P. 60(b), and the district court exercised jurisdiction under that rule to reopen the judgments in the several condemnation cases. In the light of two decisions rendered by the Supreme Court since we decided the previous appeal, we think that the district court proceeded in error. We think that those cases hold, as the government contends,

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[1] We also agree with the district court that the adult heirs' allegations of legal error did not constitute exceptional circumstances justifying relief from judgment under F. R. Civ. P. 60(b) (6). 620 F. Supp. at 896 and n.1. For reasons which we discuss later, however, we also find that the district court erred by analyzing the plaintiff's claims as actions under Rule 60.

that plaintiffs' rights, if any, can be asserted only under the provisions of the Quiet Title Act, 28 U.S.C. & 2409a (QTA).

Section 2409a(a), with certain exceptions not pertinent here, permits the United States to be named "as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." Certainly this suit falls within those terms. It is an effort by plaintiffs to obtain an adjudication that they have an existing property right in real property which the United States purportedly condemned to establish a national park and which is being used as a national park.

In Block v. North Dakota, 461 U.S. 273 (1983), the state of North Dakota, claiming ownership of certain portions of a riverbed, sued several federal officials to resolve the dispute arising from its claim and the claim of the United States to the riverbed. Initially North Dakota sought a mandamus and injunctive relief. Later it included a claim under the QTA. After North Dakota prevailed in the district court and the court of appeals, the United States sought and obtained certi-

orari on the issue of whether the statute of limitations in the QTA applied to a state; and North Dakota's cross-petition for certiorari was also granted to consider if North Dakota had a remedy supplemental to the QTA. Thus two issues were presented for decision: (1) "whether Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property," and (2) whether the QTA's 12-year statute of limitations applies when the plaintiff is a sovereign state. Id., 461 U.S. at 276-77. Both questions were decided in the affirmative, and it is the answer to the first which concerns us here.

The Court extensively considered the legislative history of the QTA, a statute which undertook to waive the sovereign immunity of the United States to suit with respect to suits involving title to land. Based upon that history, the Court concluded that the remedy embodied in the QTA was exclusive, and it rejected the argument that the QTA's restrictions to bringing such a suit could be avoided by resort to the so-called "officers suit," i.e., a suit against federal officers charged with supervision of the disputed area, rather than against the United States. The language employed

by the Court in arriving at this conclusion presages the decision we must make here:

> If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory. The United States could also be dispossessed of the disputed property without being afforded the option of paying damages, thereby thwarting the congressional intent to avoid disruptions of costly federal activities. Finally, and most relevant to the present cases, the QTA's 12-year statute of limitations, the one point on which the Executive Branch was most insistent, could be avoided, and contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted.

Id., 461 U.S. at 285.

Block was followed by United States v. Mottaz, 476 U.S. _____, 90 L. Ed.2d 841 (1986), in which a present day heir asserted that the allotment of her Indian ancestors in certain reserved lands had been illegally sold by the United States as trustee and that she was entitled to the current fair market value of her inherited interest. The Court held, on the authority of Block, that the plaintiff's claim to current market value, rather than her share of the sales price which was not distributed to her, meant that she was asserting that she was vested with title to the disputed land and therefore the QTA governed the conduct

of her suit, including the period of limitations fixed by the QTA which made her suit untimely.

While it is true that neither Block nor Mottaz considered whether a claimant to property acquired by the United States by condemnation could litigate his claim by notion under Rule 60(b) to reopen the condemnation judgment rather than under the QTA, we think that they sufficiently indicate that a claimant may not so that we hold that the Rule 60(b) motion is not available to plaintiffs in this case. The Congressional concern that the "carefully crafted provisions of the QTA" not be averted by artful pleading is too strong to permit any other conclusion. Block, 461 U.S. 285-86.

From what we have said, it might be concluded that plaintiffs' complaint must be dismissed for lack of jurisdiction because of their failure to invoke the jurisdiction of the district court under the QTA when, by direction from us to plead jurisdiction, they alleged only that they proceeded under Rule 60(b). Plaintiffs are saved from dismissal, however, by 28 U.S.C. 1653 which provides that "[d]efective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts." On the theory that it

would be improper for us or for the district court to deny plaintiffs leave to amend their complaint to allege jurisdiction under the QTA--the only possible jurisdiction base, as we hold-- and that plaintiffs would seek whatever relief is available to them, we will discuss their rights under the QTA and other applicable law.

IV.

The QTA, by 2409a(f), provides:

> Any civil action shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Because this suit was filed January 18, 1973, it follows that every competent adult member of the plaintiff group who was in being on January 17, 1961 and who knew or should have known that the United States claimed the several parcels which it had condemned was barred from suit. We think that unquestionably every competent adult in being on that date either knew or should have known of the government's claim. The government was in open and obvious possession of the lands and operating them as a national forest. See

Fulcher v. United States, 696 F.2d 1073 (4 Cir. 82). See also Grosz v. Andrus, 556 F.2d 972 (9 Cir. 1977). 444 U.S. 111 (1979). U.S. v Kubrick, 444 U.S. 111 (1979), and the terms of the QTA foreclose any claim by plaintiffs that limitations did not begin to run until they, or any one of them, became aware that they had a legal claim against the government.

Plaintiffs who are not barred by the limitations period of the QTA have a right to pursue their claims under the QTA. The Bradley pedigree data which is in the record is not in such form that we can accurately ascertain if there are any Bradley heirs who are not barred by limitations. There is also the possibility that other heirs may be born prior to January 21, 1988. For the guidance of the district court on remand, we think it desirable to delineate some of the contours of the right of any of such heirs to recover as well as the right to recover of plaintiffs, such as incompetents, against whom limitations would not run.

V.

In Fulcher v. United States, supra, we had occasion to spell out some of the ramifications of the QTA. In addition to the provisions we have mentioned, the

QTA provides that the United States shall not be disturbed in possession or control of any real property involved in an action under the section. If the action is decided against the United States, the United States may nevertheless retain the property upon payment of just compensation for the interest it retains. 28 U.S.C. & 409a(b). Fulcher was a case in which the plaintiff asserted that he had an interest in property acquired by the United States by condemnation superior to the purported owner against whom the condemnation case was instituted. The plaintiff was not named as an owner in the condemnation case nor did he receive actual notice of the condemnation until after the condemnation case was completed. We held that he could assert his right to the property under the QTA but that the government had acquired indefeasible title through condemnation and that the plaintiff, if he was not barred by the QTA's 12-year statute of limitations and if he could prove his superior title, could only recover compensation "determined by ascertaining the value of the property on the date the declaration of taking was filed," together with interest to the date of payment. Id., 632 F.2d at 280.

As applied to the instant case, Fulcher thus holds

that plaintiffs who can establish a right to recover under the QTA may not be granted a return of the property or damages based upon its current value. At most, such plaintiffs can recover only the value of their interests on the date of taking, with interest to the date of payment.

VI.

Persons who are not parties to an action ordinarily are not bound by the judgment in that action. But the government maintains that plaintiffs who may have a right to recover damages against the United States under the QTA had their rights adjudicated in the original condemnation proceedings under the doctrine of virtual representation. Under certain circumstances, it is true that a nonparty to an action may be bound by a judgment under res judicata if one of the parties to the action is so closely aligned with the interests of the nonparty as to be his virtual representative. This doctrine of virtual representation, the historical antecedent of class representation under F. R. Civ. P. 23, allows remaindermen who are incompetent or not in being to be represented in court by the existing class of remaindermen. Benner & Company v. Atlas Remainder,

Inc., 407 F.2d 219, 221 (6 Cir. 1969). See McArthur v. Scott, 113 U.S. 340 (1885). The doctrine of virtual representation is recognized by federal and state law alike in this case. Supra; S.C. Code 15-5-50; People's National Bank v. Barlow, 235 S.C. 488, 112 S.E. 2d 396 (1960); McDavid v. McDavid, 187 S.C. 127, 197 S.E. 204 (1938); Restatement (Second) of Judgments 41 (1)(e).

Because the doctrine of virtual representation applies principles of res judicata to nonparties to a judgment, the doctrine must cautiously be applied in order to avoid infringing on principles of due process. In order for the doctrine of virtual representation to apply, the heirs of Bradley whose rights were adjudicated by the original condemnation proceedings and the remaindermen plaintiffs in this action must be so closely aligned in interest as to justify precluding relitigation of the plaintiffs' claim. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 340-41 (5 Cir. 1982); Pollard v. Cockrell, 578 F.2d 1002, 1008-09 (5 Cir. 1978). The doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the interests of the parties to the different actions

are separate or where the parties to the first suit are not accountable to the nonparties who file a subsequent suit. Id. In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court. Id.; Ethnic Employees of the Library of Contress v. Boorstin, 751 F.2d 1405, 1409 (D.C. Cir. 1985); Restatement (Second) of Judgments 41(1)(e). See also Restatement (Second) of Judgments 36(1), comment b ("The essential question is whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others").

A principle issue presented by the condemnation proceedings in this case was the value to be placed on the properties that were taken by the government.[2] The interests of the adult heirs before the court as to value were identical to those of the other remaindermen. Both would strive to demonstrate the highest value possible for that property. In addition, the adult

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[2] The adult, competent heirs entered into contracts of sale to sell the properties. They did not contest the taking, and they agreed on the price. Condemnation proceedings were instituted essentially in an effort to clear title.

heirs who received the entire condemnation award would be accountable to other remaindermen not so compensated, and this potential liability would be another incentive for the adult heirs to exert every effort to obtain a maximum award. The value of the properties was thus sufficiently litigated by the adult competent parties to the condemnation action. Indeed, counsel must admit this fact, because to deny it would be to admit representation of parties having a conflict of interest.

The district court, however, refused to apply the judgment from the condemnation proceedings to two discrete groups of plaintiffs in this action. The district court refused to apply the condemnation judgment, first, to those heirs who were not in being or were unknown at the time of the condemnation proceedings because these plaintiffs were not made parties to the concemnation proceedings or were not represented by guardians ad litem. The district court's conclusion to reject application of the doctrine of virtual representation to these plaintiffs was correct. The adult heirs did not receive the approval of the condemnation court to represent the interests of the unborn or unknown heirs, nor was there any basis for finding that that court was aware during the condemnation proceedings

that the parties were acting as representatives for all of the remaindermen. While the adjudication of value as of the dates of the condemnation proceedings might be highly persuasive of the properties' values, we do not think that the condemnation judgments are legally binding on heirs not in being or unknown not represented by guardians ad litem in those proceedings. We would add that as a practical matter it is unlikely that proof can be addressed today as to value in the date of the several takings which is markedly different from the values fixed in those proceedings.

Second, the district court held that the known minor or incompetent heirs who were represented by guardians ad litem in the condemnation proceedings were entitled to recover because the guardians made only a perfunctory appearance in the condemnation proceedings in which they submitted the interests of their clients to the court and thus failed adequately to protect their clients' interests. We think that the district court erroneously failed to apply the doctrine of virtual representation to this class of plaintiffs, because the condemnation court was on notice that the adult heirs would be acting in the capacity as virtual representatives for these remaindermen by virtue of the

fact that their attorneys were withdrawing from active participation in the proceedings. As we have stated, there was no divergent interest between these two classes which would have made this representation invalid. As a consequence, we think that under the doctrine of virtual representation, the known minor or incompetent heirs who were represented by guardians ad litem were bound by the condemnation judgments and they have no right to recover in this lawsuit.

VII.

In summary, the dismissal of the claims of the adults who consented to the condemnation is affirmed.

All other provisions of the judgment are vacated, and the case is remanded with the following directions to the district court:

> Dismiss the claims of known minor heirs and incompetent heirs who were represented by a guardian ad litem in the condemnation proceedings;
>
> Dismiss the claims of all competent heirs unknown or not in being at the time of the condemnation proceedings who attained their majority at a date more than 12 years prior to the commencement of this action;
>
> Except as dismissed as aforesaid, properly join, through the appointment of a guardian ad litem or otherwise, all other heirs, including heirs who were unknown or not in being at the

time of the condemnation proceeding or who are presently unknown or not in being, ascertain the value of the properties as of the dates of taking, and award to such other heirs their respective commuted shares payable with interest to the date of payment.

No. 86-3536 - AFFIRMED.
No. 86-3537 - VACATED AND REMANDED.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

James M. Cox, Jr., Plaintiff, vs. United States of America, certain lands located in Abbeville, Greenwood, and McCormick Counties, South Carolina, being a portion of The Estates of W,K. Bradley, Deceased, The United States Forest Service, Richard Thornburg, Attorney General and the United States Department of Agriculture, Defendants.	C.A. No. 9:89-2248-8K REPORT OF MAGISTRATE

The plaintiff, James M. Cox, Jr., as heir and devisee of W.K. Bradley, is challenging for a second time the title which the United States acquired by condemnation over a portion of land from the W.K. Bradley estate in McCormick and Abbeville Counties. The plaintiff is proceeding pro se.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 19.02 (b)(2)(E), D.S.C., this magistrate is authorized to review all pretrial matters in cases involving pro se litigants and submit findings and recommendations to the

APPENDIX - B C

District Court.

This issue has previously been addressed in Klugh v. U.S., 818 F.2d 294, 297-298 (4th Cir. 1987), and Klugh v. U.S., 588 F.2d 45 (4th Cir. 1978). To avoid needless duplication, both cases are incorporated herein by reference.

The defendants have moved to dismiss or, in the alternative, for summary judgment. By order of this court filed March 5, 1991, pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Circ. 1975), the plaintiff was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion. On May 7, 1991, the plaintiff apparently served the government with a memorandum in opposition to the motion for summary judgment.[1] On May 21, 1991, the government responded to the plaintiff's memorandum. On October 16, 1991, the government filed a supplementary memorandum in support of its motion.

The defendants contend that res judicata is applicable to this case, as all issues concerning the

---

[1]The plaintiff did not file the memorandum with the court until October 4, 1991.

condemnation should have been addressed in Klugh. In Klugh, the plaintiff's mother, a party to that action, was given the opportunity to amend her complaint pursuant to the Quiet Title Act. Block v. North Dakota, 461 U.S. 273 (1983). In an order dated Febraury 25, 1988, in compliance with the Fourth Circuit decision, the court granted the plaintiff's mother the right to reopen the case within sixty days. The plaintiffs did not move to reopen, nor did they appeal either the District Court or the Court of Appeals decision.

In this action, as in Klugh, the plaintiff bases his claim as heir and devisee of W.K. Bradley. He argues that the heirs who consented to the condemnation action (1936-1939) only had life estates. The plaintiff further argues that the government had no authority to condemn land pursuant to the Weeks Act because the Act required the owners consent and life tenants could not give the proper consent.

The plaintiff admits he was represented by a guardian ad litem in the original condemnation actions but argues that the guardian ad litem was ineffective.

To circumvent the fact that his mother was a party to Klugh, the plaintiff argues that any judgment against

his mother was invalid, as she was "disinherited."

The plaintiff also argues that the Fourth Circuit committed error in the Klugh decision in applying the Quiet Title Act as "the United States never acquired title."

CONCLUSIONS AND RECOMMENDATION

The court in Klugh held that an action under the Quiet Title Act shall be barred unless it is commenced within twelve years of the date it accrued. The plaintiff was a party to the original condemnation action and, as a minor, he was represented by a guardian ad litem. If the plaintiff was one day old when the condemnation action was filed in 1936, he would have reached the age of majority in South Carolina by 1958. He then had twelve years to file an action under the Quiet Title Act. That time has passed.

Wherefore, it is recommended that this action be dismissed pursuant to the finding in Klugh, which make res judicata application to this case.

William M. Catoe, Jr.
United States Magistrate

November 27, 1991
Greenville, South Carolina

NOTICE OF RIGHT TO FILE OBJECTIONS

As the plaintiff is proceeding pro se, he is hereby advised that this report and the file of this case will be transmitted to the Court fourteen (14) days after this report is filed. During that 14-day period, but not thereafter, the plaintiff may file with the Clerk of Court any objections to the recommendation. Failure to file such objections shall result in the dismissal of this action and shall constitute a waiver of your right to appeal the final order pursuant to U.S. v. Shronce, 727 F.2d 91 (4th Cir. 1984), and Wright v. Collins, 766 F.2d 841 (4th Cir. 1985). Objection(s) should be mailed early enough to meet the deadline for filing, addressed as follows:

Ann A.Birch, Clerk
United States District Court
Post Office Box 10768
Greenville, SC29603

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENWOOD DIVISION

James M. Cox, Jr.,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Civil Action No.
	)	9:89-2248-8K
United States of America, certain lands located in Abbeville, Greenwood and McCormick Counties, South Carolina, et. al.,	)	O R D E R
	)	
Defendants	)	

The plaintiff has brought this case to challenge the title to a portion of land from the W.K. Bradley estate in McCormick and Abbeville Counties which the government acquired by condemnation. The record includes the report and recommendation of United States Magistrate Judge William M. Catoe, Jr., in which report the magistrate judge recommends that this action be dismissed on grounds of res judicata; in addition, the magistrate judge noted that any claim by the plaintiff pursuant to the Quiet Title Act is now barred due to his failure to bring this claim within 12 years from the time he reached the age of majority. See 28 U.S.C. § 2409(f). The parties were given notice of the right to file objections to the report and recommendation and

APPENDIX -- D

of the consequences for a failure to do so; in response, the plaintiff filed objections on December 10, 1991.

The report and recommendation of the United States Magistrate Judge was made in accordance with 28 U.S.C. § 636 and the local rules of this district concerning reference to a magistrate judge. See United States Magistrates, Local Rule 19, D.S.C.; Social Securiity Cases, Local Rule 20, D.S.C.; Bowman v. Bordenkircher, 522 F.2d 209 (4th Cir. 1975). Under 28 U.S.C. §636(b),

> [a] Judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Absent timely objection from a dissatisfied party, a district court is not required to review, under a de novo or any other standard, a magistrate judge's factual or legal conclusions. Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472 (1985). Here, the court has conducted a de novo review of those portions of the

magistrate judge's report and recommendation to which objections were made; however, the court concludes that the magistrate judge properly resolved the issues presented and that the plaintiff's objections are without merit.[1] In the alternative, the court finds that any claim by the plaintiff pursuant to the Quiet Title Act is now barred as untimely. Accordingly, the magistrate judge's report and recommendation dismissing this case is herely adopted as the order of this court.

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[1] In regard to the application or res judicata to the plaintiff, the magistrate judge noted, and the plaintiff admits in his filed objections, that the plaintiff was previously represented by a guardian ad litem in the noted litigation over the condemned lands. In addition, the magistrate judge noted that the plaintiff's mother was also a party to the previous litigation. The plaintiff's unsubstantiated assertion that his guardian ad litem was ineffective is insufficient to preclude application of res judicata principles to this case. In Klugh v. United States, 818 F.2d 294, 301 (4th Cir. 1987), the court held that minors who were represented by a guardian ad litem in the challenged condemnation proceeding (of which the plaintiff herein was included) are bound by the doctrine of virtual representation, and cannot challenge the 1930's condemnation judgments.

IT IS SO ORDERED.

Sol Blatt, Jr.
Senior U.S. District Judge

March 9, 1992
Charleston, S.C.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 7, 1993

No. 92-1872
CA-89-2248-8-8K

JAMES M. COX, JR.

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA, certain lands located in Greenwood, Abbeville and McCormick Counties, South Carolina, being a portion of the Estate of W.K. Bradley, deceased, UNITED STATES FOREST SERVICE; RICHARD THORNBURG; DEPARTMENT OF AGRICULTURE

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/a/ Bert M. Montague
CLERK

APPENDIX - - - F

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES M. COX, JR.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, certain lands located in Greenwood, Abbeville and McCormick Counties, South Carolina, being a portion of the Estate of W. K. Bradley, deceased; UNITED STATES FOREST SERVICE; RICHARD THORNBURG; DEPARTMENT OF AGRICULTURE,
Defendants-Appellees.

No. 92-1872

Appeal from the United States District Court
for the District of South Carolina, at Greenwood.
Solomon Blatt, Jr., Senior District Judge.
(CA-89-2248-8-8K)

Submitted: September 28, 1993

Decided: November 10, 1993

Before PHILLIPS, WILKINS, and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

James M. Cox, Jr., Appellant Pro Se. Dirk Drukker Snel, Katherine Leatherman Adams, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

APPENDIX -- E

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James M. Cox, Jr., appeals from the district court's order refusing to reconsider its dismissal of Cox's complaint as barred by the doctrine of res judicata and the statute of limitations set forth in 28 U.S.C.A. § 2409a(g) (West Supp. 1993). Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Cox v. United States*, No. CA-89-2248-8-8K (D.S.C. Mar. 11, 1992). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1678

Margaret Klugh, Katherine Klugh Maultsby, Mary Klugh Garner, John Bradley Klugh, William W. Bradley, III, Frederick H. Bradley, Patrick H. Bradley, Edna Bradley Troxell, Hugh W. Bradley, Mabel Bradley Payne, Mary Bradley Pressly, Thomas R. Bradley, William T. Bradley, Margaret Bradley Poole, Davis W. Bradley, John T. Bradley, Jr., Frances K. Bradley, Mark E. Bradley, Jr., Elizabeth Bradley McGarity, Robert F. Bradley, III, Thomas J. Bradley, Frances Wright Bradley, III, Mary Bradley Brown, Rufus A. Johnson, III, William R. Bradley, II, Margaret Bradley Shuford, Arthur L. Bradley, James B. Bradley, Curtis L. Bradley, Davis J. Wardlaw, Martha Wardlaw Buie, Forest Bradley Wardlaw, Jr., Ivey Jean Wardlaw Pressly, Robert S. Wardlaw, William W. Wardlaw, Mildred E. Wardlaw, John U. Wardlaw, Mary Wardlaw Deason, Annie Wardlaw Wright, Frances M. Wardlaw, John K. Bradley, Mary Bradley Miller, Martha Bradley Moody, Frances Trenholm Bradley, Jane H. Bradley, Martha B. Mayo, Robert F. Bradley, Jr., Eustabe U. Bradley, Mary Bradley Cox, and Frances Thompson Sheppard

Appellants,

v.

United States of America; certain lands located in Abbeville, Greenwood and McCormick Counties, South Carolina, being a portion of the estate of W.K. Bradley, deceased, and the United States Department of Agriculture.

Appellees.

APPENDIX B

Appeal from the United States District Court for the District of South Carolina, at Greenwood. Sol Blatt, Jr., District Judge.

Argued May 2, 1978 Decided November 17, 1978

Before WINTER, BUTZNER and HALL, Circuit Judges.

J. Fred Buzhardt (Barry L. Johnson, Dowling, Dowling, Sanders & Dukes, Joseph O. Rogers, Jr., Rogers, Riggs & Rickenbaker, on brief) for Appellants; Carl Strass, Attorney, Department of Justice (James W. Moorman, Acting Assistant Attorney General, Thomas E. Lydon, Jr., United States Attorney, James D. McCoy, III, Assistant United States Attorney, Edmund B. Clark and James R. Arnold, Attorneys, Department of Justice on brief) for Appellee.

WINTER, Circuit Judge:

The principal question in this appeal is the meaning of the will of W.K. Bradley of South Carolina who died on December 30, 1881 with respect to the persons in whom the fee of his real property vests. The question arises because certain of the testator's lineal descendants claim that, as devisees under the will, they have property interests in land previously owned by him which were not validly acquired by the United States in several condemnation proceedings undertaken in 1936-1939 pursuant to §§ 7 and 8 of the Weeks Act, 16 U.S.C. §§ 515, 527, 517a. The condemnation proceedings were ineffective to acquire their interests, they allege, because they were not parties to the proceedings nor did they consent to the condemnations. In their suit against the United States, they sought return of their property and also an accounting for its use since the date of the purported taking.

The district court interpreted the will to vest the remainder in fee twenty-one years after the death of the testator; and since all of the persons having any interest in the property under that construction were parties to the condemnation proceedings and offered

no contest, it granted summary judgment for the government. We do not think that under the will the fee will vest until twenty=one years after the death of the survivor of the children and grandchildren of the testator, living at his death, to whom he devised successive life estates.

Anticipating that this might be the decision we reach concerning the meaning of the will, the United States also asserts that (a) the suit is barred by limitations, and (b) the consent of minors, unknown persons and persons unborn who may have an interest in the property need not be obtained in order for the property to be condemned validly. We conclude that it would be premature for us to pass upon these questions until another question that we perceive, but which has not been briefed or argued by the parties, is resolved. Accordingly, we reverse the judgment of dismissal and remand the case to the district court for further proceedings.

I.

W.K. Bradley died on December 30, 1881; his will was dated December 8, 1881. He was survived by his widow, Sarah Frances Wideman Willis Bradley; his five

children, John E., Robert Foster, George Clarence, William Tatum and Sarah Frances Bradley Thomson; and twelve grandchildren. Of this group, the last to die was Annie Elizabeth Bradley Wardlaw, a granddaughter. She died January 21, 1967.

The pertinent portion of the will, the text of which is set out in the margin,[1] left the testator's real property and wills to his wife and children "to be theirs and for their use and benefit for life, and after their death to go to their children and on down as far as the law will allow."

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[1] ...I will that all of my land and mills vis (testator here enumerates his real property in South Carolina) or any other lands that I may die possessed of in any State or Territory in the United States and all of my personal property, consisting of notes, mortgages, accounts, and money, life stock, etc., be given to my dearly beloved wife Sarah Frances Bradley and my children namely John Edward Bradley, Robert Foster Bradley, and Sarah Grances Thomson to be theirs and for their use and benefit for life, and after their death to go to their children and on down as far as the law will allow. I intend it shall be perpetruated in my family, and not to be disposed of in any way for the debts of any one or all the family any members of the family can settle on any one of the places by all agreeing as to the value of the rent he must account for: If the family cannot agree as to the value of such place or places, then disinterested parties must be called in and they must fix a price to such place or places. I further will that all of my family, wife and children be a power to select some one of the family to

(Footnote 1 Continued)

Although the will did not establish a formal trust and name trustees, it provided for the management of the property, gave the heirs the right to occupy the propeerty upon paying rent, and provided for an annual

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1 Continued

transact all of the business connected with the Estate who must keep a book of receipts and expenditures for each year said Agent to be chosen annually, and on the first Monday in January of each year make a just settlement with each member of the family of the net proceeds of the Estate. That my intention may be more fully understood, with regard to the interest of each of the above named members of the family, that the property be kept in common and that each distributive share for each year must go to each of the above named heirs an-- and for their use and benefit, and not to pay any note or indebtedness to any or all of said heirs. In regard to the interest that my dearly beloved wife must have in the Estate, I further will her the above described Home place, houses and all the furniture, household and kitchen, all stock horses, mules, cattle, hogs, etc., to be hers for life and at her death to revert to the Estate. And I further will that she have an equal share of the annual proceeds of the Estate, during her life time to dispose of as she may think best. And as all of my children are of age I further will that each of them become Executors of this my Last Will and Testament Thomas P. Thomson representing my daughter Sarah Frances Thomson. Any person property may be sold by those of the family agreeing as to time and price. Any member of the family who does not conform to the requirements of this will shall be disinherited by the order of the will.

distribution of the net income of the estate to each member of the family entitled thereto. The testator directed that the estate "shall be perpetuated in my family," and he forbade both the sale of any portion of the property and application of the distributive share of the annual net income to satisfy the debts of any member of the family.

The estate included many acres of land, some of which was cultivated, some of which was pasture land, and some of which was improved by buildings and dwelling houses.

In 1910, the will was interpreted by the Court of Common Pleas of Abbeville County, South Carolina. At that time the testator's widow had died, as had three of his five children. One of his deceased children had left a widow who instituted the litigation, and another of the deceased children had left surviving him "numerous children, some of whom were not in being when the testator died." Bradley v. Bradley, Court of Common Pleas, Abbeville County, South Carolina, decree entered September 30, 1910 (unreported). In the suit, the widow sought a partition and division of the estate and an accounting of the yearly income alleging that,

under the South Carolina rules of intestate succession, she had succeeded to her husband's interest and to his share of the interest of his mother and his sibling who died without issue, both of whom also died intestate. The court ruled otherwise, holding:

> The testator, as is shown by a consideration of the Will, intended to devise the whole of his estate and to die intestate as to none of it; and there is an entire lack of evidence necessary to overcome the presumption against partial intestacy.
>
> The strongest and most conclusive ground, however, is the very evident intention of William K. Bradley to perpetuate the estate in his family as far as possible, and to create the life estates sub-ordinate and sub-servient to this purpose. In construing the terms of a Will, the obvious intention of the testator, provided it is not inconsistent with an established rule of law or repugnant to public policy, always controls.....
>
> The intention of the testator herein expressed is neither inconsistent with established rules of law nor repugnant to public policy. The life estates were devised to the heirs-at-law "to be theirs and for their use and benefit for life, and after their death to go to their children and on down as far as the law will allow." In case a life-tenant dies without leaving children, the life tenancy merges again in the common property, and the widow or widower as the case may be, takes no interest. If there are any children they share as representatives of the parent. Any other construction would defeat the clearly apparent intention of the testator.

Accordingly, the South Carolina court decreed an accounting of the net income of the estate with distribution to be made one-third (1/3) to each of the

testator's two surviving children and one twenty-first (1/21) to each of the seven children of the deceased child of the testator who died with issue.

Some of the lands of the estate were condemned by the United States in 1936 (164.40 acres, part of a total condemnation of 1,744.10 acres in McCormick County, S.C.), in 1937 (2.003.70 acres, part of a total condemnation of 4,177.30 acres in Greenwood and McCormick Counties, S.C.), and in 1939 (1,074.20 acres, part of a total condemnation of 1,922.10 acres in McCormick and Abbeville Counties, S.C.) to establish a national forest. The condemnations were conducted under §§ 7 and 8 of the Weeks Act, 16 U.S.C. §§ 515, 517 and 517a, one of the provisions of which is that the United States shall not acquire lands under that Act "until the legislature of the State in which the land lies shall have consented to the acquisition of such land..." South Carolina did consent to the condemnation, S.C. Code § 3-1-410, but its consent was conditioned upon "the consent of the owner...[as to] any building, dwelling house or cultivated or pasture lands."

In the instant case, plaintiffs alleged that most of the condemned lands fit into the category requiring

individual owner consent. It is apparently not disputed that those of the adult lineal descendants of the testator who had life estates at the time of the several condemnation proceedings consented, at least to the condemnation of their life estates, but it is claimed that they did not consent to the condemnation of their undivided interest, if any, in the contingent remainder in the fee. The government makes no claim that guardians or legal representatives of unknown or unborn heirs were named and served in the condemnation proceedings, but it does assert that publication of the desire of the United States to acquire the lands against "unknown, non-resident or minor" owners was made pursuant to S.C. Code § 28-7-10.

Although the exact number and the identities of the present holders are not clear in the record before us, it appears also that, if the will is interpreted not to vest the fee until 21 years after the death of the last survivor of the lives in being at the date of death of the testator, some life estates have come into being subsequent to the condemnation proceedings. Indeed, under that construction additional life estates may come into being until 1988, and not until January 21,

1988 (or October 21, 1988, if, on January 21, 1988, a putative taker is en ventre sa mere) will the ultimate takers of the fee be known.

The district court construed the will as expressing an intention to devise life estates to successive lineal generations as a class "as far as the law will allow." The quoted phrase, the district court concluded, indicated recognition by the testator that a perpetual devolution of generational life estates is limited by law. By application of the rule against perpetuities, the district court ruled that the fee interest in the testator's property vested in the testator's great-grandchildren living 21 years after the testator's death. The district court found support for its ruling in the management provisions of the will and thought that its result created useful, rather than continuously fragmented, life estates. Having placed this construction on the will, the district court found that the eleven great-grandchildren, alive 21 years after the death of the testator and alive also on the dates of the condemnations, had been served and did not contest the condemnations, with the result that the district court entered judgment for the United States.

II.

As the Court of Common Pleas in the 1910 construction case stated, "the obvious intention of the testator, provided it is not inconsistent with an established rule of law or repugnant to public policy, always controls...." This is as much the law of South Carolina today as it was in 1910 or in 1881 when the will became effective. See Shelby v. Shelby, 244 S.C. 598, 137 S.E. 2d 851 (1964); Shelvin v. Colony Lutheran Church, 227 S.C. 598, 88 S.E. 2d 674 (1955); Green v. Green, 210 S.C. 391, 42 S.E.2d 884 (1947). As is manifest, the intention of the testator in the instant case was to postpone the ultimate devolution of his estate for "as far as the law will allow," creating in the interim prior to ultimate devolution a series of life estates, determined in the 1910 construction case to be measured in quantum by per stirpes distribution, and not per capita. The questions in this case thus become, first, how long does the law allow, and second, what did the testator mean by the use of the phrase, for the answers to these questions will determine in whom was the fee vested in the 1936-39 condemnation cases and whose consent was required with respect to the

condemnation of any buildings, dwelling houses, or cultivated or pasture lands.

The limitation of the law on the postponement of the vesting of the fee is the rule against perpetutities, which is recognized as the law of South Carolina. Cox v. Buch, 39 S.C.L. 604 (1851). The rule is that a future interest must vest within a life or lives in being at the time that the interest is created plus 21 years and the period of periods of gestation, where applicable. See Restatement of Property §§ 370 and 374. The operation of the rule in the instant case depends upon the proper interpretation of the testator's will, and it is this to which we now turn.

Basically, we must decide whether the testator intended his estate to devolve on successive classes of descendants or whether his intent was to create successive life estates in his descendants individually for as long as the rule against perpetuities might allow. This determination of intent is critical because the length of time during which future interests are permitted to survive is shortened where the testator intends the gifts to his descendants to be by classes. See Restatement of Property § 383. This is so because

under the majority view the rule against perpetuities is violated and the remote interests voided if the period prescribed by the rule may be exceeded, not whether it actually is exceeded.[2] See Black v. Gettys, 119 S.E. 2d 660, 664 (S.C. 1961). Thus, a devise of a life estate to grandchildren with remainder over to great-grandchildren as a class would violate the rule, because it is possible that a great-grandchild may be born more than 21 years after the death of a life in being at the time of the testator's death. Where it is possible that the interest given to one member of the class may violate the rule against perpetuities, the gift is void as to the entire class. As a consequence,

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[2]This is the so-called "what-might-happen" approach in applying the rule against perpetuities. The more modern approach, adopted in a number of states (but not South Carolina) and advocated by the draftsmen of the proposed Restatement of the Law Second, Property (Tent. Draft No. 1, March 15, 1978), is the "wait-and-see" approach under which the determination of whether an interest fails under the rule against perpetuities is made on the basis of what does happen and not what might happen. See Restatement (Second) of Property, Comment d, Statutory Note to Section 2.4, and Reporter's Note to Section 1.4 (Tentative Draft No. 1, 1978). See also summary of discussion of Tentative Draft No. 1 at American Law Institute Meeting, May 1978, 46 U.S.L.W. 2635 (May 30, 1978).

in the example cited, the fee would vest in grandchildren in order to avoid running afoul of the rule against perpetuities.

We do not think however, that in the instant case the testator intended to make class gifts under the will in question. It is true that for his heirs and descendants more remote than his widow and five children, to whom he referred by name, he employed only the word "children" and that there is a rule of construction that the use of such a phrase usually limits a class gift. Restatement of Property § 279. The use of the word "children" might denote an intention to create a class gift, but its use might equally be explained by the fact that some of the testator's intended takers were not yet in being and the testator could not know their names. In any event, the rule is simply a rule of construction, and it is subservient to any contrary intention of the testator expressed elsewhere in his will.

We think that in the will in question the testator expressed the intent not to be bound by the usual rule of construction arising from his use of the term "children" and that he intended to postpone the vesting

of the fee interest in his property for the longest period that the rule against perpetuities would permit. First, the testator employed the phrase, in describing the postponement of vesting, "to their children and on down as far as the law will allow." (Emphasis added.) We think that this means for the maximum period that the rule against perpetuities would permit under any reasonable construction of the will. Similar language was given this construction in Fritchie v. Brown, 211 U.S. 321 (1908); Gale v. Gale, 85 N.H. 358, 159A 122 (1932); and Stellings v. Autry, 254 N.C. 303, 126 S.E. 2d 140 (1962). Second, the testator articulated his intent that his estate be "perpetuated in [his] family," and he reinforced this expression by spendthrift provisions and management provisions. This, too, evidences an intention for the restriction to continue as long as possible under any reasonable construction of the will and negatives an intention to make a class gift which would have the effect of shortening the period. Unlike the district court, we do not think that the negative inference to be drawn from the testator's failure to provide for the selection of a manager or executors beyond the generation of his children is

sufficient to overcome his other expresions that vesting be postponed beyond the death of his children.

Thus, taking as the measuring life the survivors of those mentioned in the testator's will who were alive on the date of his death (his widow, his five children and his twelve grandchildren), see Fitchie v. Brown, 211 U.S. at 330-34, we hold that, under the proper interpretation of the will, the fee to the testator's lands will not vest until January 21, 1988, and possibly as much as nine months later. On remand, the district court should reevaluate the effect of the service of process and failure to contest in the 1936-1939 condemnation proceedings as defense to plaintiffs' claims in the light of this holding.

III.

The government also asserts other legal defenses to the suit. It contends, first, that the action is in substance a quiet title action and that the twelve-year statute of limitations contained in 28 U.S.C. § 2409a(f) bars suit since more than twelve years have elapsed since 1939, the date of the last taking. Its second defense is that, under § 8 of the Weeks Act, as amended, 16 U.S.C. §§ 517 and 517(a), and such authority as

United States v. County of Fairfax, Virginia, 345 U.S. 344, 348-49 (1953), the United States is not obliged to join remote possible claimants in order to acquire fee simple title by condemnation; and therefore the united States acquired good title in the original condemnations in the instant case.

Of course, plaintiffs vigorously challenge these contentions. With respect to the defense of limitations, they assert that (a) the district court retained jurisdiction in the condemnation cases and the instant action is merely a reopening of them and not a suit to quiet title under 28 U.S.C. § 2409(a),[3] (b) the instant case is a motion under F.R. Civ. P. 60(b)(4) to attack

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[3]From our examination of the papers in the condemnation actions, we think that this contention is lacking in merit. In the order in each of the three condemnation actions confirming the jury's verdict, the district court directed payment of the verdict into the registry of the court and, upon payment, authorized the clerk to execute a deed conveying title to the United States. In each of such orders, the court added, "Let this cause remain open for such other and further orders, decrees and judgments as may be necessary in the premises," or words of similar import. Significantly, however, in subsequent orders making final distribution of the moneys in the court's registry, no such reservation of jurisdiction was recited. We think that the language reserving jurisdiction was limited to subsequent orders to disburse the proceeds, not to reopen the proceedings, and that jurisdiction was exhausted when final distribution was made.

a void judgment,[4] and (c) even if the suit is deemed an action to quiet title, limitations cannot begin to run until title vests and until any title holders cease to be minors. With respect to the joinder of "remote" owners, plaintiffs stress that this is a case, unlike most condemnation cases, where the consent of all owners is required before the United States has any authority to dondemn.

Except for our comment in the margin, we express no views on these various legal issues. We decline to do so for two reasons. First, we cannot tell from the record before us who, of the putative takers of the fee, was in being at the time of the condemnation actions and

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[4] In denying the government's motion to dismiss for lack of jurisdiction, the district court ruled that the instant proceeding "is really a continuation of the original action by way of motion either under 60(b) or by independent action in equity, which is ancillary to the main action." The whole problem about the district court's jurisdiction stems largely from the fact that the jurisdictional allegations of the complaint are patently deficient. While plaintiffs alleged that "the parties hereto, the subject matter hereof and all things hereinafter alleged are within the jurisdiction of the [district court]," no statute, rule or other jurisdictional base was alleged. On remand, the district court should require that the complaint be amended to comply with F.R. Civ. P. 8(a)(1).

whether specific notice as given to them. Second and more importantly, we find from our examination of the papers in each of the condemnation cases that the unknown heirs and assigns of the testator and some or all of his children were alleged to have a property interest in the Bradley property taken and proceeded against by publication in accordance with S.C. Code § 28-7-10 and its predecessors. However, guardians ad litem were not appointed to represent unknown heirs of the testator while guardians ad litem were appointed to represent known minor owners and, in one case, an owner who was incompetent.

Thus we think that, before the defenses asserted by the United States are adjudicated, it is necessary to decide what was the legal effect of joining the unknown heirs and proceeding against them by publication when they were not represented by guardians ad litem and did not participate in the proceedings. An important factor, we think, in the resolution of this question is the requirement of §§ 7 and 8 of the Weeks Act and of S.C. Code § 3-1-410 requiring the consent of the owners as to the condemnation of any building, dwelling house, or cultivated or pasture lands sought to be condemned,

although we express no view on the weight to be given this factor. Neither in their briefs nor in oral argument have the parties addressed the question of the effect of joining unknown heirs and proceeding against them by publication but without the appointment of a guardian ad litem. It should be addressed in an adversary proceeding becuase upon its resolution may depend the outcome of this law suit; its resolution may obviate the necessity of considering the validity of the government's other defenses.

Accordingly, the judgment of the district court is reversed and the case is remanded for futher proceedings in accordance with this opinion.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

The dispositive issue in this case is whether the testator intended to bestow his benefice upon his descendants individually, or upon as many generational classes of descendants as the law would allow.

The devise in question is made to the testator's wife, W, and to his children, namely, U, V, X, Y, and Z for their use for life "and after their death to go to their children and on down as far as the law will allow."

I think these terms of devise clearly express an intent to have interests in the estate following the life estates pass successively to as many generations, as classes, as legally possible, with the remainder of the estate vesting in that most distant generational class which the law would permit. It is well established that the Rule Against Perpetuities voids all class gifts to any generation of descendants beyond the class of the testator's grandchildren. Gray, The Rule Against Perpetuities, Ch. 10 (4th Ed. 1942). Therefore, I think the remainder of the estate has vested in the already-determined class of this action should be for the limited purpose of discovering whether

those grandchildren or their heirs received proper notice of the condemnation proceedings.

The inherent class nature of the testator's gifts to successive generations is supported by three considerations.

First, the testator had twelve grandchildren living at the time of his death but chose to refer to them merely as his children's children, evidencing, as the majority notes, a clear intent to benefit all his grandchildren regardless of when born. Such a gift is, by definition, a class gift. 4A Thompson on Real Property, § 2002 (1961 Repl. Vol.).

Second, absent specific indicators to the contrary, it is presumed that a testator intends to treat equally family members of equal standing--that is, as generational classes of descendants. 5 American Law of Property, § 22.2 (A.J. Casner Ed. 1952). If the testator had intended to devise individual gifts to descendants, following the life estates in named persons, he would, in all likelihood, have named the grandchildren alive at his death as devisees because they would have been known to him as individual objects of his affection. He chose not to name them but rather

referred to them merely as his children's children, giving them no preference over grandchildren who might be born after his death.

Third, early vesting of estates is always preferred by courts in the construction of wills. This is the very purpose of the Rule Against Perpetuities: to facilitate the free alienation of property which in turn helps assure its proper maintenance and changing use as dictated by the changing circumstances of its various owners and of society as a whole. Thompson, supra at § 2018. Rules of construction have time-honored places in property law because of the important social interest they represent. Where a testator intends to tie up his estate for as long as possible, thus creating a great burden upon his family and upon society, his intent should be expressed in very plain terms and should never be found by courts upon implication--especially where, as here, a much more plausible intent is presented by the express language of the will.

The majority finds that the testator's overriding intent was to tie up the estate for as long as possible. In order to accommodate this overriding intent, the

majority has construed the testator's undefined gifts to successive generations--which it concedes are couched in the language of class gifts--to be instead individual gifts because such a construction would tie up the estate much longer than class gifts. Under this construction the remainder of the estate will vest after the death of the last family member who was alive at the time of the testator's death--in this case, twenty-one years after the death in 1967 of an unnamed grandchild, or 107 years after the death of the testator.

The majority's analysis does not hold up under close scrutiny of the language in the will. First, it construes the terms, to "their children and on down as far as the law will allow," out of context. These words are characterized as a description of the postponement of vesting rather than as terms of devise which identify the interests created and the devisees. In effect, by begging the question, the majority construes these terms to mean "for as long as the law will allow." See Fitchie v. Brown, 211 U.S. 321, 328 (1908). But those are not the testator's words, and that construction violates the meaning of the terms used by the testator when read as part of the sentence in which he named

members of his immediate family and the life estates they were to take under the will. In that sentence, he identified other participants in the estate generally as his "[children's] children and on down." He did not specify the interest to be conveyed to those unnamed descendants but did, I think, intend to identify the ultimate takers as that generation most distant from his which could legally take under the will --"as far as the law would allow." He did not use these terms to describe the postponement of vesting; he used them to identify the objects of his benefice.

Second, the majority supports its construction by generally reciting the testator's express intent to perpetuate the estate in his family. This statement does not qualify his gifts to classes of descendants. It means the testator wanted to have generation after generation benefit by the terms of the will. But he acknowledged that such a grandiose intent was not permitted by law. He did not have a singular intent to tie up his estate for as long as possible; he intended to include every member of each generation regardless of when born.

Third, the majority finds that the inclusion of

provisions for management of the estate support its construction. These provisions do not establish a grand scheme for the perpetual management of the estate. The testator's primary concern, as noted by the district court, was for the management of the estate during the pendency of the life estates which he divised to his wife and children, each of whom he named. The testator specified that those persons hold their life estates in common and that they were to elect a family member to manage the estate. Beyond this no comprehensive scheme of trusteeship was established. In fact, the scant provisions for management of the estate and the distinction drawn between named individuals and the generations following them support a construction favoring class gifts to those successive generations.

In conclusion, the express terms of the devise to successive generations are inherently terms of class gifts. The rules of construction for the vesting of estates and for the equal treatment of descendants of equal standing and affection to the testator strongly militate against the construction found by the majority. Therefore, I respectfully dissent.